STATE OF MICHIGAN

COURT OF APPEALS

MOORE & CARTER LUMBER REAL ESTATE COMPANY, Plaintiff-Appellee,	UNPUBLISHED August 30, 2007
v ARNO HASSLER and VIRGINIA HASSLER, Defendants-Appellants.	No. 267883 Sanilac Circuit Court LC No. 04-030125-CK

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In this contract dispute, defendants appeal as of right from the trial court's order granting plaintiff's request for specific performance of certain option contracts to purchase real property. We affirm.

On September 15, 1994, the parties entered into two option contracts for the purchase of real property. The options were designated the Phase II and Phase III options of the parties' dealings. The options were set to expire after a period of ten years. On August 9, 2004, plaintiff's president personally delivered to Virginia Hassler notice of plaintiff's intent to exercise the options. Defendants subsequently refused to convey the property. Plaintiff filed suit and moved for summary disposition pursuant to MCR 2.116(C)(10). After hearing the parties' arguments, the trial court summarily disposed of several issues raised by defendants. Following a bench trial, the court granted judgment to plaintiff.

In a case tried without a jury, the trial court's factual findings are generally reviewed for clear error and the court's legal decisions are reviewed de novo. See *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 291-292, 303; 706 NW2d 897 (2005). However, the concerns raised by defendants on appeal were more specifically addressed by the court during the hearing on the motion for summary disposition. Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." This Court reviews de novo a trial court's ruling concerning a motion for summary disposition brought under MCR 2.116(C)(10). *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858, lv den 473 Mich 853 (2005).

In contract law, an option is a continuing offer by which the owner of property agrees with another that the latter may buy the property at a fixed price within a specified period. *Bil-Gel Co v Thoma*, 345 Mich 698, 708; 77 NW2d 89 (1956). An option is composed of two elements: (1) the offer to sell and (2) the contract to leave the offer open for a time certain. *Id*. "'[S]trict compliance' with the terms of an option is the rule in Michigan." *Rapanos v Plumer*, 41 Mich App 586, 588; 200 NW2d 462 (1972).

Defendants contend that the trial court erred because plaintiff provided personal service of its notice of intent to exercise the option only to Virginia Hassler (who in turn gave the notice to Arno Hassler). The options required that written notice be personally delivered or sent by certified mail "to Seller." The options identify Arno and Virginia Hassler collectively "as Seller."

Michigan courts have previously excused a failure to strictly comply with the notice requirements of an option. For example, in *Jefferson Land Co v Kannowski*, 233 Mich 210, 213; 206 NW 351 (1925), our Supreme Court found notice to the seller-husband alone sufficient despite the fact that his wife, from whom he was separated, had signed the option, where the wife's only interest in the property was "an inchoate right of dower, which was nothing she could sell apart from joining with her husband." Relying on *Jefferson Land Co*, this Court in *Rapanos*, *supra* at 587-588, excused a failure to notify the son of a land owner about an intent to exercise an option, even though the son was listed as a "seller" in the option, because excusing noncompliance would not prejudice anyone with anything more than an expectation of inheritance concerning the optioned property.

Unlike those who failed to receive notice in *Jefferson Land Co* and *Rapanos*, Arno Hassler was a full co-owner of the property at issue. Nevertheless, because Arno admitted that he received timely notice of plaintiff's intent to exercise the options, no inequitable prejudice would result from excusing strict compliance with the notice requirements. Therefore, as in *Jefferson Land Co* and *Rapanos*, we conclude that the lack of strict compliance may be excused. The trial court did not err by refusing to require strict compliance with the notice requirements of the options in this case.

Defendants also assert that that the trial court erred by excusing the fact that the down payment check that accompanied the notice was only payable to Arno Hassler and that it was drafted on an account owned by plaintiff's parent company, Moore & Carter Lumber Company (M&C LC). Evidence was presented that the Phase II and Phase III options plaintiff was attempting to exercise were originally part of a larger transaction involving the sale of the Phase I property. In turn, evidence was presented that plaintiff had paid for the Phase I property with over 100 monthly checks drawn on the M&C LC account, and that those checks were also made out to Arno Hassler alone, without complaint from defendants.

A course of dealing is "[a]n established pattern of conduct between parties in a series of transactions." Black's Law Dictionary (8th ed). In this case, the evidence supports the court's finding that the parties had an established pattern of conduct suggesting that it was acceptable that checks from plaintiff be made payable to Arno Hassler and drawn on an M&C LC account. Our Supreme Court has indicated that strict performance of a written agreement may be waived and the agreement modified where the parties consider it to their benefit to excuse strict performance. *Jacob v Cummings*, 213 Mich 373, 378; 182 NW 115 (1921). In so holding, the

Court stated that "[a] departure from stipulated performance can be predicated upon acts as well as upon an express agreement to that effect." *Id*. at 378-379. Because the course of dealing between these parties indicated that a down payment check drawn on an M&C LC account and made payable to Arno alone would be sufficient for plaintiff to exercise the options, the trial court's ruling in this regard was not in error.

Defendants further assert that the trial court erred by granting specific performance to plaintiff because the notice provided to Virginia Hassler did not contain a legal description of the property on which the options were being exercised. The options required that "[t]he written notice of exercise of the option shall describe the property on which the option is exercised." The notice provided to Virginia stated that "[w]e are notifying you, in writing, of our election of the Option to Purchase both Phase II and Phase III of our purchase agreement."

It is apparent from their provisions that the Phase II and Phase III options provided plaintiff with the ability to purchase less than all of the property available under the options. In other words, plaintiff could make a partial election of all the available property. Thus, the requirement of a description of the property on which the option was being exercised can be read as simply requiring plaintiff to inform defendants whether the options were being exercised in full, or if they were only being exercised on a portion of the available property. The notice of plaintiff's election "of the Option to Purchase both Phase II and Phase III" indicated that the options were being exercised in full. In other words, because of the structure of the options, the reference to purchasing "both Phase II and Phase III" sufficiently described the property on which the options were being exercised. The options did not require that a legal description of the property be provided in the written notices to exercise the options, and a legal description was not necessary for defendants to know what plaintiff was attempting to purchase. The options themselves contained the legal descriptions of the land and the reference thereto in the notice was sufficient to meet any legal or contractual requirements. See, generally, *Sulzberger v Steinhauer*, 235 Mich 253, 257; 209 NW 68 (1926).

Finally, defendants assert that the trial court erred when it granted partial summary disposition to plaintiff with regard to defendants' assertion that inadequate consideration supported the options. A completed contract to leave an offer open must be supported by consideration. *Bil-Gel Co*, *supra* at 708.

Defendants assert that in *George v Schuman*, 202 Mich 241, 248-250; 168 NW 486 (1918), our Supreme Court recognized that courts of chancery required consideration to be adequate in relation to the value of the property at issue, and defendants suggest that this Court should also consider the value of the property in relation to the consideration paid for the option. Defendants assert that the $1 exchanged for each option at issue here was insufficient.

Defendants misinterpret *George*. *George* distinguished between the consideration tendered for the option and the consideration tendered for the contract of sale. *Id*. *George* recognized that while consideration for the option may be nominal in accord with the rule of law, courts of chancery required consideration for the contract of sale be adequate in accord with the rule of equity. *Id*. at 249. Because nominal consideration supported the options at issue in this case, the options were valid contracts and could be specifically enforced. *Id*. at 249-250. See also *Sulzberger*, *supra* at 257. Accordingly, the trial court correctly granted summary disposition to plaintiff on this issue.

The trial court correctly required specific performance of the option contracts.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter